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Key Points to Consider when Collecting Data for use in Disputes arising from COVID-19

There is little doubt that Covid-19 has taken the construction industry by surprise. Parties to construction contracts are reassessing their positions and even the viability of their projects in a way that was unimaginable a few months ago. These reassessments include resolving outstanding disputes and pursuing damage limitation measures. Many will want to settle their disputes and move forward, while some will continue to pursue claims.

Legal positions on the cessation of extension of time provisions in the contract agreement will influence the period to which liquidated damages apply and the period for which a claim would be restricted to one for general damages. For the latter, the consequential increased evidential burden on the claiming party to prove its loss, can be an onerous one. Data collation for delay and cost claims will need to be done efficiently and effectively.

Triple Point Technology Inc v PTT Public Company Limited [2019] EWCA Civ 230 –

> "The fact that PTT cannot recover liquidated damages … does not mean that it is left without a remedy for non-completion. Such damages are at large, …"

Once the relevant provisions in the contract agreement have been assessed with regard to entitlement, establishing the status of the project accurately, particularly leading up to the impact of Covid-19, including any subsequent termination, is essential.

"Contractors need to keep a tight hold on their project data to give themselves the best chance of success with future claims"

In some cases, this will present a significant challenge. In the pre-Covid-19 world, the primary focus would have been on progressing the physical works to completion and exposure of the project records to rigorous scrutiny would not have been anticipated. This has changed, with records becoming the new focal point, unfortunately, data sources in the record pool will be found to be disparate and inconsistent on many projects.
The following key points are offered to guide a thorough but proportionate approach to collating and refining the data pool to inform time and cost claims.

1 – Use indexing tools to refine the data pool by identifying document categories available and eliminating duplications.

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Inspect by sample and tag or code useful documents or source types.

2 – Keep the search relevant. With electronic document systems, the ease of copying and transmission of duplicated records, some with minor irrelevant differences, swells the record pool, making it difficult to navigate and focus on that which is significant to the claim. To avoid this, clearly identify the purpose of interrogating the data in sufficient levels, to enable refinement of the source material. Concentrate on material that will provide the facts.

3 – Identify alternative search descriptions when using electronic key word searches to avoid important information being overlooked. Terminology in projects can develop over time, so the same aspect of the project may be named or described differently in the records.

4 – Locate any tracker files used during the project to manage and track progress of contract administration documents, e.g. scope change summaries, resources, plant and materials. These are often used to report progress in monthly reports, so inspecting a sample of these can point to the existence of this type of record file. These files often save time in refining the data at a later stage.

5 – As a priority, identify sources of data that have been formally agreed between the parties which will have higher evidential weight, including the outcome of any contract addendums relating to time and cost. Testing records or site inspection logs are typical examples when signed by both parties. Use of a mutually approved data in delay or cost analyses also reduces the likelihood of disagreements later on. When investigating events, check and include any relevant electronic meeting records and other channels set up to encourage collaboration on projects as a source of information; they can contain helpful insights and evidence.

6 – Include alternative data sets. One data source, unless pre-agreed between the parties as reliable and appropriate, may be inconsistent with other available data sources on which the opposing party may rely. The party that has sought to establish what sources are available, the differences between them and provided justification why one source is to be preferred over another, is more likely to fare better in a dispute.

7 – When the initial data set has been identified, refine it into source types and identify proportionate ways to test the data consistency. For larger or complex projects or disputes, it is usually more efficient to export numerical data into MS Excel or Access to interrogate it. Look for relationships between the data sources adding basic coding as necessary to enable efficient linking and interrogation of the data.

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8 – Consider splitting the data collation into two phases. Isolate data types required to identify a loss first. For extension of time claims, isolation of appropriate planned and actual progress data, comparison between them to calculate delays and identifying those that related to critical activities on the schedules, will define the points of focus for causation. In all but the simplest of projects, with only limited causative events, adopting an 'effect-cause' approach will help to refine the data requiring inspection and maintain relevance.

Society of Construction Law Delay and Disruption Protocol – 2nd Edition February 2017 para. 11.4 (a)

> "Certain methods start with the identification and description of an event (a cause) and thereafter seek to establish its impact (the effect) - these are cause and effect type analyses. Other methods start with identifying critical delay (an effect) and thereafter seek to establish what might have caused that delay - these are effect and cause type analyses. Where the EOT application is assessed after completion of the works, or significantly after the effect of an Employer Risk Event, then the effect and cause methods are generally considered to be more forensically reliable because they consider any and all potential causes of the delay incurred".

9 – Time-lapse photography records are a useful progress data source for checking the accuracy of reported data. Still photographs are of limited use as a progress record unless the dates they were taken are embedded in the images.

10 – BIM Models contain relevant progress information and can be a useful source of progress data. It is advisable to check any contractual provisions in relation to intellectual property and copywrite restrictions before relying on this information, particularly when using external consultants.

Conclusion:
Considering these key points when collating and refining data will help avoid some of the common pitfalls in preparing submissions or responding to claims. They will also help to expose any significant deficiencies in the available records early on, providing the parties with an opportunity to make commercial decisions on how and, indeed, whether to proceed with a claim. These points serve as a reminder to contractors to keep a tight hold on their project data to give themselves the best chance of success with future claims.

If you require any further information, please contact Lori Noeth at lorinoeth@hka.com.

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